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No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

WILLIAM HARVEY ELROD, JR.
205 Holly Street, N.E.
Decatur, AL 35601
(205) 355-3731
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-6477

QUESTIONS PRESENTED

1. Does a plaintiff's status as a civilian employee of the federal government preclude a *Bivens*-type suit by such plaintiff personally against another federal civilian employee personally, for such defendant's alleged violation of that plaintiff's First or Fifth Amendment rights in course of that defendant's procuring of that plaintiff's demotion?

2. Does administrative relief with respect to such demotion, *qua* personnel action, pre-empt a *Bivens*-type suit by the improperly demoted federal civilian employee, as an individual person, against the individual person who, while purporting to act in his official executive position with the federal government, allegedly conspired with others to procure the demotion in retaliation for the plaintiff's publicly commenting upon personnel and management practices at the governmental facility where both parties were employed and which the defendant headed?

PARTIES TO THE PROCEEDING BELOW

The only parties to the proceeding in the courts below were those listed in the caption of the case in this Court—viz., William C. Bush, Petitioner, and William R. Lucas, Respondent.

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BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The court of appeals' opinion on remand appears at 647 F.2d 573 (5th Cir. 1981). That court's original opinion appears at 598 F.2d 958 (5th Cir. 1979). A copy of the district court's unpublished memorandum of opinion appears in Appendix D, at d-2—d-17, to the petition.

JURISDICTION OF THIS COURT

Entry of the judgment of the court of appeals on remand occurred on 12 June 1981. (J.A. 3.) The filing of the petition for certiorari followed on 4 September 1981. The petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, rules and regulations, the relevant parts of which are set forth in Appendix H to the petition for certiorari:

U.S. CONST. art. III, § 2, cl. 1;

U.S. CONST. amend. I;

U.S. CONST. amend. V;

5 U. S. C. §§1301, 3302, 5596, 7511 and 7701;

28 U. S. C. §1331(a) (1976);

Civil Service Rule V, §5.1, Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956);

5 C.F.R. §§752.101, 752.104, 752.202, 752.203, 752.401, 772.101, 772.102, 772.301, 772.305, 772.307—772.310 and 772.312 (1975).

STATEMENT OF THE CASE

This is a *Bivens*-type damage suit[1] between two natural persons in their individual capacities. (Summons, J.A. 3; Complaint, Count Four, J.A. 4—7). Both the parties, whom we hereafter call by their respective surnames only, are civilian employees of the United States Government. (¶¶1 and 2, Count Four, J.A. 4—5; Lucas Affid., J.A. 13, 14; Bush Affid., J.A. 29 at 30; Lucas Dep. 8, 10, 11, 24, 103, J.A. 41, 42, 47, 79.) Bush bases his *Bivens*-type claim upon a conspiracy (¶¶2 through 6, Count Four, Complaint, J.A. 4—7) allegedly participated in by Lucas while "purporting to act in his official capacity as Director of the George C. Marshall Space Flight Center...." (first ¶2, Count Four, Complaint, J.A. 4—5).

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[1] I. e., this is an action brought directly under the Constitution and seeking to recover damages for wrongful invasion or abridgement of constitutional rights—specifically, rights to be free from retaliatory civil service demotion and other steps taken by way of punishment for the petitioner-plaintiff's having "let ... members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at Marshall Space Flight Center." (¶6, Count Four, Complaint, J.A. 7.) *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as amplified, since the filing of this suit, in *Davis* v. *Passman*, 442 U.S. 228 (1979), and in *Carlson* v. *Green*, 446 U.S. 14 (1980). Upon prior petition for certiorari, this Court remanded this case to the Fifth Circuit for reconsideration in the light of *Carlson*. (446 U.S. 914 [1980].)

In addition to the final count setting forth the *Bivens*-type claim, the complaint in this case includes three counts in defamation. (R. 5—7). As counsel for Lucas correctly note (Brief for Respondent in Opposition to Petition for Certiorari, 3 n.2), the Fifth Circuit has twice sustained the district court's ruling that the respondent is entitled to absolute immunity as to the defamation claims; and the questions which Bush now presents relate only to the lower courts' disposition of the *Bivens*-type claim. The defamation counts remain in the record.

The Decision Under Review

The United States Court of Appeals for the former Fifth Circuit has found, in terms, "that the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." (647 F.2d 573 at 577 [1981]; Pet. App. A at a-12.) Upon the basis of such finding—coupled with *Carlson's* apparent lack of impact upon *Barr* v. *Matteo*—,[2] the former Fifth Circuit has reaffirmed (J.A. 3) its prior decision (598 F.2d 958 [5th Cir. 1979]; Pet. App. C at cl-1 through cl-14) as intermediately vacated by this court (446 U.S. 914 [1980]). In so reaffirming its own original decision, that court of appeals also again affirmed (J.A. 3) the 4 February 1977 order of the United States District Court for the Northern District of Alabama granting Lucas' motion for summary judgment (J.A. 95). That motion (J.A. 12—13) first set forth the general ground of a failure to state a claim, etc., and then invoked a doctrine of absolute immunity as enveloping all that Lucas had done within the outer perimeter of his duties as Director of the George C. Marshall Space Flight Center, which we hereinafter call "MFSC."

The Employment Relationship, Environment and Related Events

Both Bush and Lucas have been at MSFC for a number of years. (J.A. 4—5, 17—18.) Bush has been employed there as an aerospace engineer. (J.A. 4, 13—14.) Lucas has been the Director of MSFC since mid-1974. (J.A. 17—18, 86.) MSFC is one of

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[2] In its first affirmance (598 F.2d 958, 959, 960) of the district court's according Lucas absolute immunity with respect to Bush's defamation claims, the former Fifth Circuit relied upon *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Butz* v. *Economou*, 438 U.S. 478 (1979). It also cited *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 872-873 (5th Cir. 1978).

several major field facilities (J.A. 18, 43) maintained by the National Aeronautics and Space Administration, which we hereinafter call "NASA." Lucas has been with NASA since 1960. (J.A. 42.) NASA is a part of the United States Government. (42 U.S.C. §2472.)

In course of a major reorganization in 1974, MSFC management assigned Bush to a new position. (J.A. 30; Pet. App. E at e-3.) Bush found few if any actual duties corresponding to the description of the position. (J.A. 30.) Intra-organizational efforts to induce MSFC management to change or abolish the position were unavailing. (*id.*) In separate appeals to the Civil Service Commission, which we hereinafter call "the CSC," Bush assailed both the classification of the position and his assignment to the position.

In the spring of 1975, and while *those* administrative "appeals" were pending (Pet. App. E at e-4—e-5; Pet. App. F at f-18), the media attributed several public statements to Bush to the effect that his position description had been written improperly " 'to support the GS-15 branch chief,' and was a 'falsehood, a travesty and worthless'; ... that he was reporting what 'appear[ed] to be a fraudulent use of Federal funds ....'; that he did not have enough meaningful work to keep him busy; that he spent no more than thirty minutes to an hour each day on official work; and that his job was unnecessary and should be abolished to save the taxpayers' money." (J.A. 13—14, and see J.A. 31.)

Bush's public statements "greatly disturbed" Lucas, both by virtue of their content and by virtue of "the fact that they came to ... [his] attention initially through newspaper articles and television broadcasts." (J.A. 14.) "Consequently, ... [Lucas] took the following action: First, ... [he] asked ... [his] subordinate managers with cognizance over ... Bush's function to look into the matter and report to ... [Lucas]; Second ..., [he]

requested that an independent investigation into ... Bush's allegations be conducted by the NASA Inspections Division." (*id.;* and see, further, J.A. 31—32.) Lucas assigned the initial, internal, investigation to a Mr. James E. Kingsbury, who was the Director of Science and Engineering at MSFC (J.A. 44) and whom we hereinafter call "Kingsbury." Several days later (J.A. 52, 53), Lucas told (J.A. 53) his subordinate Mr. John Potate (J.A. 45), whom we hereinafter call "Potate," to undertake to obtain the second, or "independent [,] investigation into ... Bush's allegations ... by the NASA Inspections Division" (J.A. 14, 53).[3]

Lucas received periodic reports from Kingsbury and Potate as to the progress of the respective investigations. (J.A. 32, 45, 56, 59, 80 and 81.) Kingsbury's interim progress reports on the internal investigation probably were oral. (J.A. 80.) As Lucas recalled (J.A. 44, 45), the NASA Inspection Division's (J.A. 14) Dr. [or Mr.] Olsen (J.A. 44, 53, 80) did not complete the second, or independent, investigation until around 1 July 1975. (J.A. 44, 45.)

That second investigation was still in progress (J.A. 45) on 25 June 1975 when, in response to questions asked him by a television reporter, Lucas said that he had had Bush's statement that Bush had no meaningful work to do investigated and that Lucas could " 'say unequivocally that such a statement ha[d] no basis in fact.' " (J.A. 15; and see J.A. 74—75.) Lucas later swore (J.A. 16—17) that he had based such statement on his part "upon the assurances ... [he] had received from the above-

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[3] In the course of the taking of his deposition upon oral examination in this case, Lucas testified that the second investigation by NASA's Mr. [or Dr.] Olsen, was "[i]ndependent ... in the sense that ... [Olsen did not] report to ... [Lucas]." (J.A. 53.) Olsen was "the NASA inspection representative ... [at MSFC.]" (*id.*) He "report[ed] to NASA Headquarters." (*id.*)

mentioned investigations...." (J.A. 15.) He further swore that "[a]s a result of both investigations, ... [he] was assured that ... Bush did have a valid job description; that the function for which ... [Bush] was responsible was necessary to fulfill ... [MSFC's] missions; that ... [Bush] did have enough meaningful work to keep him busy; and that, in fact, ... [Bush] had been putting in a reasonable day's work." (J.A. 14.) Lucas still later (J.A. 39—40) swore that such assurance had come in part from Kingsbury "on the basis of ... [Kingsbury's] investigations [,] which ... [Lucas] presumed ... [Kingsbury] got from other sources...." (J.A. 59) and in part "from ... Potate [,] who obtained it from ... Olsen, whom ... [Lucas] presume[d] got it from several other sources." (*id.;* and see, also, J.A. 45).

Lucas did not ask Potate to obtain an independent investigation of the impact of Bush's public statements. (J.A. 56.) As Lucas understood the matter, the Olsen investigation essentially had been directed toward ascertaining whether Bush did have " 'meaningful work to do.' " (*id.*) Lucas could not judge whether Bush's public statements constituted any threat to MSFC's mission. (J.A. 50.) When counsel for Bush asked Lucas, at the taking of the latter's deposition upon oral examination in this case, whether Bush's public remarks substantially complicated Lucas' task as Director of MSFC, Lucas responded to the effect that it was his judgment that such of the remarks as were false and misleading depressed morale at the center and adversely affected "the attitudes and respect of the people in ... [MSFC] ... for ... [MSFC] ..."; and, further, that it had been his judgment that the remarks "would affect the productivity of ... [MSFC] ..." (J.A. 70.) Lucas further recalled, at the taking of his deposition upon oral examination, that, in response to a question asked him at the intervening CSC hearing, he had "named a few people that ... [he] had had some expressions from, and [that he then, at the CSC hearing, had] ... indicated that it was ... [his] judgment that such statements would affect the morale of the people." (*id.*)

Agency's Adverse Personnel Action

About a month, or slightly more, after Olsen completed his investigation (J.A. 44—45), Kingsbury, as Director of MSFC's Science and Engineering Directorate, gave Bush formal notice of a proposed adverse action to remove Bush from his position (J.A. 15; Pet. App. F at f-2.) The notice bore date of 1 August 1975. (*id.*) The assigned grounds for such proposed removal were Bush's prior public statements, which the notice of proposed adverse action characterized as "intemperate ...[,] misleading and often false..." (Pet. App. F at f-2) and, further, as "evidencing a malicious attitude towards Management and generating an environment of sensationalism demeaning to the Government, the National Aeronautics and Space Administration and the personnel of ...[MSFC]...." (*id.*, at f-2—f-3.) Charge 1 of the notice further stated that, by making such remarks, Bush had "imped[ed] ... government efficiency and economy and adversely affect[ed] ... public confidence in the Government service...." (*id.*) There followed several pages of specifications detailing Bush's prior statements and conduct sought to be made the basis of his removal. (*id.*) Lucas later swore that he did not "become involved in ... [the adverse action] until ...Kingsbury had decided what to do about the matter, or recommended [the adverse action.]" (J.A. 69.) Lucas had seen a draft of the notice, and discussed it with Kingsbury, after having heard, from MSFC's legal office, that the MSFC Science and Engineering Directorate "was recommending action against ...Bush...." (*id.*) Lucas said, however, that he "did not engage in that [earlier] discussion with ... Kingsbury [as intermediately reported to Lucas by the MSFC legal office.]" (*id.*)

After Bush's written and oral responses (mentioned at Pet. App. E, e-6) to the notice of proposed adverse action, Lucas, as agency deciding official, reduced Bush's general schedule grade from GS-14 to GS-12 and transferred Bush to a different posi-

tion at MSFC. (J.A. 15; Pet. App. E at e-1.) The attendant reduction in Bush's annual pay was on the order of $9716.00. (Pet. App. E, e-1.) The effective date of the adverse action and pay reduction (Pet. App. E, e-40—e-41) was 30 November 1975 (*id.* at e-1). Lucas later said that, as of the time that he decided to take the adverse action, he understood that the purpose of the action was "disciplinary or a penalty for having made the false and misleading statements." (J.A. 73.) Lucas was of the view that certain of the reasons assigned in the advance notice of proposed adverse action "were sufficient to warrant ... Bush's removal in order to promote the efficiency of the service." (J.A. 15.) Since, however, Bush's statements constituted his "first offense of record, ... [Lucas] decided to reduce the penalty to a reduction-in-grade ... and to transfer ... [Bush] [within the MSFC] organization." (*id.*) Lucas later testified that he gave no consideration to either the deterrent effect or the institutional impact, at MSFC, of the decision. (J.A. 74.) Lucas read Olsen's written report and "quoted some of the things that he had found" in Lucas's decisional letter (J.A. 81) of November 25, 1975 (J.A. 15).

Administrative Review of Agency Personnel Action

Bush timely appealed the adverse personnel decision to the CSC. (Pet. App. E at e-1, e-2.) While finding the advance notice to have been procedurally defective with respect to one of the two principal charges (Pet. App. E at e-11, e-12), the initial CSC decision sustained the agency action (*id.* at e-41) on the basis of the other charge—viz., that Bush "did on more than one occasion publicly make statements which were misleading ...." (*id.* at e-12, as qualified at e-12 and e-13). Accordingly, the CSC's first-tier review tribunal on 12 August 1976 affirmed the reduction-in-grade. (*id.* at e-42.) On Bush's petition, however, the CSC's Appeals Review Board, as that body was called in July of 1978, rendered a decision (Pet. App. F) reversing (*id.* at f-25)

the initial CSC decision and recommending that Bush be restored "to his former position, grade ... and pay, retroactively to November 30, 1975." (Pet. App. F at f-26.) Applying a *Pickering*[4]-type balancing test, the Appeals Review Board based its decision upon a perceived unjustifiable "abrogation of the exercise of free speech." (*id.* at f-25.) After the Civil Service Commissioners' 10 October 1978 denial (Pet. App. G at g-2) of NASA's 21 August 1978 petition to reopen the Appeals Review Board's decision, MSFC took the corrective action recommended by the Board. (See Brief for Respondent in Opposition to Petition, 3 n.1.)

The Damage Suit

Administrative review of Bush's reduction-in-grade lasted from December of 1975 (Pet. App. E at e-1) until October of 1978 (Pet. App. G at g-1.) While such review was still pending at the first level of the CSC's appellate hierarchy, and on the day before an Alabama statute of limitations[5] might have barred at least the defamation claims, Bush sued Lucas individually in a state court. (J.A. 3—7.) In this suit, Bush seeks to recover damages from Lucas for, among other wrongs, Lucas' having conspired with others, "while purporting to act in his official capacity as Director of ... [MFSC],... to deprive ... [Bush] of his constitutional rights of freedom of speech and of petition to Congress ...." (First ¶2, Count Four, Complaint, J.A. 4—5.) According to subsequent averments of Bush's complaint, the conspiratorial violations of his First Amendment rights "have consisted in the efforts of ... [Lucas] and his co-conspirators, in

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[4] *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

[5] Tit. 7, §26, Ala. Code 1940 as "Recompiled"—now distributed, in relevant part, among Subdivs. (1), (4) and (5) of §6-2-39(a), Ala. Code 1975, effective 31 October 1977. Bush sued on 24 June 1976. (J.A. 8, 21, 27.)

pursuance of ... [a] common intent of continuing waste of public funds and forces ... without accounting therefor, to squelch ... [Bush] in his letting members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at ... [MSFC]." (¶6, Count Four, Complaint, J.A. 7.) Bush claims that "[f]or having so expressed himself, ... [he] has been punished by ... [Lucas] ... by being demoted ... and by being denounced as, in effect, a liar in advance of any hearing upon the charges ultimately made against ... [him]." (*id.*) He also claims that he incurred great expense in seeking administrative redress. (J.A. 6.)

On 9 July 1976, Lucas removed the suit to the United States District Court for the Northern District of Alabama. (J.A. 1, 8—11.) Without answering the complaint, he then moved alternatively for dismissal of the complaint or for summary judgment. (J.A. 1, 12—22.) After Bush's interim (J.A. 23—37) and supplemental (J.A. 82—87) responses to Lucas' motion, and after the limited (J.A. 37—38) discovery (J.A. 38—82) permitted by the district court, that court granted Lucas' motion on or about 4 February 1977. (J.A. 95; and see J.A. 2.) In a memorandum-opinion (Pet. App. D at d-2—d-17), the district court considered the defamation claim and the conspiracy claim discretely. Treating the former as having no constitutional overtones or implications (*id.* at d-7, d-8), the district court regarded *Barr* v. *Matteo* as controlling (*id.* at d-4) on the point of Lucas' immunity to suit on that claim, as discretely considered.

While regarding the conspiracy claim as asserting violations of Bush's constitutional rights and as being "based on the seminal case of *Bivens* v. *Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971) ..." (Pet. App. D at d-12), the district court nevertheless concluded that the availability of administrative relief, albeit from the Government and not from Lucas (*id.*, d-15, n.5), precluded Bush from maintaining suit against Lucas for "damages based," as the district

court said, "on ... [Bush's] demotion, allegedly contrived as a punishment for ... [Bush's prior public] statements" (*id.* at d-16).

On 7 March 1977, Bush appealed to the United States Court of Appeals for the Fifth Circuit. (J.A. 96.) Between the time that Bush took that appeal and the time that the Fifth Circuit reached the case for oral argument, the administrative review of the adverse personnel action had run its course and Bush had been restored in grade, with back pay, etc. (Pet. App. F at f-25—f-26; Pet. App. G at g-1—g-3; and see Brief for Respondent in Opposition to [the present] Petition, 3 n.1.) During the same interval, this Court had decided *Butz* v. *Economou*, 438 U.S. 478 (1978), and had granted certiorari in *Davis* v. *Passman*, 439 U.S. 925 (1978). The Fifth Circuit "withheld decision" (598 F.2d 958, 959) on Bush's case "pending ... [this] Court's review of *Davis* v. *Passman*." (*id.*)

On 12 July 1979, a few weeks after this Court decided *Davis* v. *Passman*, the Fifth Circuit affirmed the district court's granting of Lucas' motion for summary judgment. *Bush* v. *Lucas*, 598 F.2d 958, *reh. denied, mem.*, 605 F.2d 554 (5th Cir. 1979). On Bush's ensuing application for writ of certiorari, this Court vacated the original judgment of the Court of Appeals for the Fifth Circuit and remanded the case to that court "for further consideration in light of *Carlson* v. *Green* ...." *Bush* v. *Lucas*, 446 U.S. 914 (1980).

On remand, the Fifth Circuit rendered the decision presently under review. *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981); and see Pet. App. A.

SUMMARY OF ARGUMENT

I. The status of a *Bivens* plaintiff as a civilian employee of the federal government is not sufficient to constitute a "special factor counseling hesitation" in the according of the *Bivens* remedy to such plaintiff. Such status may not be given such effect without unduly burdening the exercise of fundamental rights, and the redressing of violations of those rights by resort to the courts. The Government's interest as employer does not per se preclude a *Bivens*-type suit to redress constitutional deprivations occurring more or less in the context of the litigants' common employment as civil servants. Rather, that interest of the Government, *as employer,* is one of several interests to be balanced in determining which of the interests, or congeries of interests, directly asserted or implicated by or on behalf of the litigants should prevail in a particular case. Such balancing is not to be done *in vacuo*. Rather, it must take into account the concrete circumstances of the particular case.

In this particular case, Bush asserts individual interests which implicate societal interests of a very high order. While specifically seeking to obtain access to the courts to obtain further redress than that already accorded him administratively, Bush does so in order fully to vindicate First Amendment rights. The primary rights sought to be vindicated are Bush's rights to express himself publicly on matters of public concern and to petition the Government for redress of grievances. Those are fundamental rights in the preservation of which society at large has a substantial interest. Bush's status as an employee of the Government does not deprive him altogether of those rights, although such status admittedly may justify some restriction of those rights in the public interest. Such restriction, however, can be justified only upon the *demonstrated* existence of incompatibility between particular exercises of those rights and the preservation of a paramount governmental interest.

Lucas has not demonstrated the existence of such incompatibility in this case. Congress' creation of a civil service system, while certainly attended by efforts to preserve some balance between the rights of governmental employees as citizens and the interest of the Government as employer, does not evidence incompatibility between the maintenance of the efficiency of the public service and vindication of the employees' First Amendment rights by a *Bivens*-type suit. Nor does the conjuring up of potential administrative inconvenience in consequence of the according of *Bivens*-type remedies to civilian employees of the Government.

II. Administrative relief with respect to an adverse personnel action, *qua* personnel action, does not preclude Bush from maintaining a *Bivens*-type action against Lucas in the latter's individual capacity. That administrative relief was reinstatement and back-pay. At the time that Bush received such relief, the governing statutes and regulations did not authorize any award of attorneys' fees or reimbursement of expenses necessarily incurred in seeking such relief. Nor were those statutes and regulations sufficiently comprehensive or sufficiently focalized to warrant an inference that Congress meant for the statutes, as implemented by the regulations, to be the exclusive remedy for a civilian employee who had suffered a retaliatory demotion effected in reprisal for his having exercised his First Amendment rights. Moreover, such an inference, even had it been warranted, would not have constituted an explicit Congressional declaration that the statutes, with or without the regulations, were to be a substitute for a *Bivens*-type suit.

The administrative relief came from the Government pursuant to limited waivers of sovereignty. It afforded partial compensation. It afforded no deterrent.

ARGUMENT

1. A Plaintiff's Status As A Civilian Employee Of The Federal Government Does Not Preclude Him, As An Individual Person, From A *Bivens*-Type Remedy Against Another Civilian Governmental Employee As An Individual Person.

The court of appeals' opinion on remand in this case concedes that, under *Carlson's* clear teaching,

> Bush is entitled to seek a constitutional damage remedy for retaliatory demotion unless ... [Lucas] can demonstrate either that special factors are present which counsel hesitation in the absence of affirmative action by Congress, or that Congress has provided an alternative remedy which it intended as a substitute for, and considered equally effective as, a *Bivens* remedy.

Bush v. *Lucas*, 647 F.2d 573, 575 (5th Cir. 1981); and see Pet. App. A at a-5.

While professedly pretermitting, but perhaps actually preserving (*compare* Petition for Certiorari, 21 and n.6, *with* Brief in Opposition, 9—10) the pre-emptive remedy question, the court of appeals finds "that the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." (*Bush* v. *Lucas*, 647 F.2d 573, 577; Pet. App. A at a-12.) Upon the basis of such "finding," the court of appeals not only hesitates; it halts. It holds "that absent more explicit direction from Congress, a *Bivens* remedy should not be inferred." (*id.*)

A. *Governmental employment per se should not be regarded as a "special factor counselling hesitation in the absence of affirmative action by Congress."*

In its apparent preoccupation with Bush's status as a government employee, the court of appeals misapprehended the nature of Bush's suit. Bush seeks damages for the wrong done him by Lucas in abuse of the latter's power. Bush does not presently seek, indeed he already has obtained (Pet. App. F at f-25—f-26; and see Brief in Opposition to Petition for Certiorari, 3 and n.1), relief from the Government. That relief with respect to the adverse personnel action, *qua* personnel action, did not make Bush whole. Bush, the individual victim, seeks to recover the difference, plus punitive damages, from Lucas, the individual wrongdoer. At least until Congress says otherwise, the victim's and the tortfeasor's common status as civilian employees of the federal government should not shield the tortfeasor from liability for that difference, plus punitive damages. Constitutional guaranties of individual freedom ordinarily apply alike "to all persons, no matter what their calling." *Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (Fourteenth Amendment). If the coincidence of victim's and tortfeasor's having a common calling as civilian employees of the federal government is sufficient to shield the tortfeasor from liability to the victim for a *Bivens*-type tort, absolute executive immunity is in effect restored pro tanto, notwithstanding *Butz* v. *Economou*, 438 U.S. 478 (1980), and *Harlow* v. *Fitzgerald*, 457 U.S. ____, 102 S.Ct. 2727 (1982).

1. *There should be a balancing of interests prior to any finding that the asserted governmental interest outweighs the asserted individual interests.*

At least two additional, and perhaps more fundamental, flaws affect the court of appeals' conception and use of the role of the Government as employer. First, in postulating a public employer invested with wide latitude and discretion in the management of its own internal affairs, and more particularly

personnel matters, the Fifth Circuit apparently overlooks the fact that, as such employer—as an apparatus—, the Government itself is subject to the Constitution. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers." *Savings and Loan Ass'n* v. *Topeka*, 87 U.S. (20 Wall.) 455, 461 (1875). No entity or person has discretion to violate the Constitution. *Cf. Owen* v. *City of Independence*, 445 U.S. 622, 649 (1980) (municipality). The Bill of Rights monitors the activities of federal functionaries no less than those of state officials. *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). Thus it is that, under a rule of law, the interest of the Government, as an employer or otherwise, is to be weighed in the balance when that interest conflicts with one or more interests asserted either by an individual or by a group. *See Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), and the many cases in its train.

2. *Congress has not done any preemptive balancing of the competing interests involved in this case.*

In this case, Bush asserts several interests. Of primary concern at this juncture is his assertion of an interest in a remedy accorded the citizenry at large for constitutional violations by federal functionaries acting under color of law. Without itself balancing that interest against the interest of the Government as employer, the Fifth Circuit suggests that Congress already has balanced those interests. (647 F.2d at 576—577; Pet. App. A at a-8—a-9, a-9—a-10.) The Fifth Circuit finds such Congressional balancing-of-interests in a series of statutes all but one of which antedate *Bivens*.[6] The one post-*Bivens* statute cited by the

[6] Congress passed the Pendleton Act in 1883. ch. 27, 22 Stat. 403. It passed the Lloyd-LaFollette Act in 1912. ch. 389, 37 Stat. 555. Congress apparently passed the Back Pay Acts to which the Fifth Circuit

Fifth Circuit is the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111).[7] The Fifth Circuit never explicitly says that Congress struck any balance as between the interest of civilian employees in access to court on *Bivens*-type claims and the interest of the Government as employer. Such omission is understandable. Congress has never made such a determination.

3. *Upon balancing of interests in this case, the individual interests and the implicated societal interests outweigh the interest of the Government as employer.*

This case calls for a balancing of interests, but by a court and not by Congress. Such need for judicial balancing-of-interests exists in this case even though Bush does not dispute the abstract accuracy of the general proposition that the Government may impose *some* restrictions upon the speech and conduct of its civilian employees which it could not impose upon the citizenry at large. *See, e. g., Pickering* v. *Board of Education, supra;* and *CSC* v. *National Ass'n of Let. Car.*, 413 U.S. 548 (1973). And *cf. McCarthy* v. *Philadelphia Civil Service Com'n*, 424 U.S. 645 (1976). While conceding that proposition

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refers in 1948 and 1966. (*Compare Bush* v. *Lucas*, 647 F.2d at 576 [Pet. App. A at a-9] *with* 5 U.S.C. §5596 [1967]). Congress further amended the Back Pay Act in 1975, 1978 and 1980. (*Compare* 5 U.S.C.S. §5596 n. [1980]); but the Fifth Circuit does not include those amendments in the series of acts by which, according to the Fifth Circuit, "Congress has sought to achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action." (647 F.2d at 576; Pet. App. A at a-9.)

[7] In the Brief and Opposition to Bush's present position, counsel for Lucas concedes that Bush sued Lucas before Congress passed the Civil Service Reform Act of 1978. (Brief in Opposition, Nov. 1981, p. 8 n.5.) In his Brief and Opposition to Bush's prior petition for cert., he then Solicitor General not only made the same concessions, he observed that the 1978 Acts' amendments to the pre-existing administrative remedy "do not affect the merits of this case." (Brief for Respondent at 6 n.5, *Bush* v. *Lucas*, 446 U.S. 914 [1980].)

in the abstract, Bush asserts individual interests which, in the concrete circumstances of this case, outweigh the overly-generalized and undelimited governmental interest postulated by the court of appeals. Initially, Bush specifically avers that Lucas and the latter's co-conspirators effected Bush's demotion by way of punishment for having exercised specified First Amendment rights. (J.A. 7.) Such averments, supported in some circumstantial measure (see, e. g., J.A. 69, 73, 74, 80—81; Pet. App. E at e-12; and Pet. App. F at f-2—f-3) by the limited factual record which the trial court permitted to be developed (J.A. 37—38), implicate a constitutionally-protected individual interest not amenable to dilution by virtue of the mere existence of the postulated employment relationship. *See, e. g., Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Pickering* v. *Board of Education, supra; Bernasconi* v. *Tempe Elementary School Dist. No. 3,* 548 F.2d 857 (9th Cir. 1977), *cert. denied,* 434 U.S. 825 (1978); *Pred* v. *Board of Instruction of Dade County, Fla.,* 415 F.2d 851 (5th Cir. 1969); and *Berry* v. *Macon County Board of Education,* 380 F. Supp. 1244 (M.D. Ala. 1971). In an effort fully to vindicate his primary individual interest in freedom from retaliatory demotion for exercising his First Amendment rights, Bush asserts an individual interest in being accorded a *Bivens*-type remedy.

Bush contends that judicial interdiction of a *Bivens*-type suit can not be justified merely upon the basis of a plaintiff's status as a civilian employee of the federal government. Bush contends that if such denial of access to courts for the determination of constitutional questions (*see Procunier* v. *Martinez,* 416 U.S. 396 [1974]; *Cruz* v. *Beto,* 405 U.S. 319 [1972]; and *Silver* v. *Cormier,* 529 F.2d 161 [10th Cir. 1976]; *cf. Califano* v. *Sanders,* 430 U.S. 99, 109—110 [1977]) can be justified at all, such justification may be found only upon a showing, by the Government, that: (a) there is an identifiable, and identified, governmental interest of such paramount importance, in our scale of societal values, that such governmental interest, unaugmented by any other considerations, outweighs the interest of individual

civilian employees in having *Bivens*-type remedies available for the full vindication of those employees' First Amendment rights; (b) that there is no way of adjusting and accommodating the two competing interests, so that they may co-exist without conflict and impairment; (c) that subordination of the individual interest to the paramount governmental interest is vital to the preservation or furtherance of the latter; (d) that the gain to the paramount governmental interest outweighs the loss inflicted upon the subordinated individual interest; and (e) that the means adopted in diminishing the individual interest be so drawn as to avoid unnecessary abridgment of that interest.

Those, in paraphrase, are the requirements which repeated pronouncements by this Court or different members thereof impose with respect to any burdening of the exercise of First Amendment rights by individual persons—governmental employees included. *Elrod* v. *Burns*, 427 U.S. 347, 362—363 (1976) (plurality opinion); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 259—260 (1977) (Powell, J., concurring, with Burger, C. J., and Blackmun, J., joining in such concurrence); and *cf. Keyishian* v. *Board of Regents of New York*, 358 U.S. 589, 602 (1967).

When tested by those standards, "the Government employer-employee relationship present in this case ..." (*Bush* v. *Lucas*, 647 F.2d 573, 577 [5th Cir. 1981]; Pet. App. A at a-12) hardly seems a legitimate basis for denying Bush a *Bivens*-type remedy. And we think it proper to test the suggested "special factor" by those standards because, as espoused by the Fifth Circuit, that "special factor" clearly would burden the exercise of a fundamental First Amendment right: in addition to penalizing a particular plaintiff, it would deter other prospective plaintiffs in seeking to vindicate to the fullest their First Amendment rights.

B. *Conjectural considerations of administrative convenience do not outweigh constitutional values.*

The court of appeals' use of the employer-employee relationship as a per se disqualification of Bush as a *Bivens*-type plain-

tiff is not ameliorated, in our judgment, by the apprehensions and conjectures voiced by that court (*Bush* v. *Lucas*, 647 F.2d 573, 577 [5th Cir. 1981]; Pet. App. A at a-10—a-11) with respect to the possible consequences, first in terms of administrative inconvenience and ultimately as a "disincentive to Congress" (*id.*), of according a *Bivens*-type remedy to civilian employees of the federal government. In view not only of the differences in the types of relief available under administrative review of adverse personnel actions *qua* personnel actions and under *Bivens* but also of the differences in the parties involved, not to mention the relative prospects of recovery, it is quite difficult to envision any massive "bypass[ing] [of] the statutory and administrative remedies in order to seek judicial relief...." (647 F.2d at 577; Pet. App. A at a-10.) Certainly, no empirical data on such an exodus appear anywhere in the memos, opinions and briefs served to date in this action. Moreover, as we have noted (*ante*, pp. 9-10, 12), Bush did exhaust his administrative remedies. Finally, even under the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111), administrative remedies do not effectively fulfill the deterrent function that *Bivens* is capable of fulfilling.

In short, the Fifth Circuit's finding of one or more[4] "special factors counseling hesitation" (647 F.2d 573, 575, 577; Pet. App. A at a-6, a-12) appears, upon analysis, to be composed,

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[4] We say "one or more" advisedly; for, as we have noted (*ante*, p. 15; and see Petition for Certiorari, 21 and n.6), the Fifth Circuit may be holding the pre-emption question in reserve. Moreover, one of the federal judges who has cited the Fifth Circuit's decision on remand in *Bush* v. *Lucas* has remarked that

> In denying ... [Bush] a right of action under the Constitution, the ... [Fifth Circuit] disavowed reliance on the "alternative remedy" prong of the *Carlson* test. Its analysis of the "special factors" prong, however, turned largely on the availability of a comprehensive remedial scheme reflecting an effort by Congress to "achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action .... Although the ... [Fifth Circuit]

like Lucas' antecedent "demonstration,"[9] of unequal parts of premature *per se-ism*, a priori assumptions and invocation of considerations of administrative convenience in a constitutional context. We submit that such a pastiche does not disclose any basis for denying Bush a *Bivens*-type remedy to avenge Lucas' alleged impairment of fundamental First Amendment rights.

Other lower federal courts have accorded a mixed reception to the Fifth Circuit's decision on remand in this case.[10] Petitions for certiorari in one or more of those other cases may now be pending before this Court.

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ultimately incorporated this analysis under a "special factors" heading, it appears that *Lucas* [sic] would have been governed by *Davis* v. *Passman* but for the presence of an alternative remedial scheme.

Jaffee v. *United States*, 663 F.2d 1226, 1244—1245 (3d Cir. 1981) (en banc) (Adams, Cir. J., concurring in part and dissenting in part).

Finally, the Fifth Circuit itself initially mentioned its finding "special factors" (647 F.2d at 575, Pet. App. A at a-6) and did not singularize the term until the final paragraph of text of its decision on remand.

[9] Since Lucas served and filed his alternative motion to dismiss or for summary judgment (J.A. 12—22) without answering; since, apart from the general ground of failure to state a claim, etc., the motion rested upon the doctrine of absolute immunity (J.A. 12, 13—22 *passim*, 40—81 *passim*, 87—94 *passim;* since *Butz* v. *Economou*, *supra*, and *Harlow* v. *Fitzgerald*, *supra*, clearly appear to have limited officials with Lucas' functional responsibilities and level to qualified immunity only; and since *Harlow* has categorized such qualified immunity as an affirmative defense, to be pleaded by the defendant who relies thereon, it would seem to follow that Lucas' "demonstration" of "special factors" must be viewed as consisting only of his Supplemental Brief on remand to the Fifth Circuit and, further, as going only to the question of the sufficiency of Count Four of the complaint (J.A. 4—7).

[10] Published decisions of other courts citing the decision on remand in this case include, among perhaps others by now: *Jaffe* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), *cert. possibly pending; Sonntag* v. *Dooley* (7th Cir. 1981), *reh'g denied*, 14 Sep. 1981 (mem.); *Francisco* v.

II. Administrative Relief With Respect To An Adverse Personnel Action Does Not Pre-Empt A *Bivens*-Type Suit By The Victim Of An Unconstitutional Retaliatory Demotion.

A. *Congress has never said either: (1) that it intended such administrative relief as a substitute for a Bivens-type suit; or (2) that it viewed such administrative relief as being equally effective as a Bivens-type suit.*

In order for an alternative statutory remedy to preclude a *Bivens*-type action, the statutory remedy must be "equally effective in the view of Congress." *Bivens*, 403 U.S. at 397 (1971); *and see Davis*, 442 U.S. at 248 (1979), and *Carlson*, 446 U.S. at 19 (1980). At a purely verbal or strictly literal level, Lucas can not point, we believe, to any "*explicit* congressional declaration that persons injured by federal officers' violations of the ... [First] Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *See Carlson*, 446 U.S. at 19 (emphasis added).

B. *The administrative remedies afforded Bush were not equally as effective, either in terms of compensation or in terms of deterrence, as a Bivens-type suit may be.*

Regarding the matter, however, as not one to be resolved upon merely linguistic considerations, by the choice *vel non* of

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Schmidt, 532 F. Supp. 850 (E.D. Wis. 1982); and *Carroll* v. *United States*, 522 F. Supp. 458 (N.D. Tex. 1981). Bush personally regards an interlocutory decision in *McAnaw* v. *Custis*, No. 81-4137, (D. Kan. 15 Jan. 1982) which has not been published in full text, although it has been summarized at Gov't Empl. Rel. Report 949:8, Feb. 8, 1982, as being sufficiently noteworthy as to justify his venturing to include a copy of the MS opinion as Appendix B to this brief. He similarly reproduces a counterpart of the order denying rehearing in *Sonntag* v. *Dooley*, No. 80-2435 (8th Cir. 14 Sept. 1981) as Appendix A to this brief.

"the magic words,"[11] or by the mere employment of "a formalistic procedural approach,"[12] we still say that, in this case, "the implied remedy[13] is plainly appropriate under any measure of discretion."[14] Conceding that Bush did receive back pay and reinstatement under the CSC Regulations then in force, we say that such administrative remedies, *received at the hands of the Government*, should not preclude Bush from maintaining a *Bivens*-type action against Lucas, the *individual natural person* who allegedly conspired with others to procure Bush's demotion. Such administrative relief as Bush may have received from the Government should not preclude his pursuit of Lucas in a *Bivens*-type suit because:

(a) The administrative remedies do not fully compensate Bush.

[1] Quite apart from the more or less dignitary aspects of his claim, and over and above his administratively redressed loss of pay, etc., Bush incurred substantial legal fees, used a number of hours of leave-time and necessarily made certain incidental outlays in seeking, and eventually obtaining, reinstatement and

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[11] *Carlson* v. *Green*, 446 U.S. 14, 31 (Burger, C. J., dissenting.)

[12] *Id.*, at 31 (Rehnquist, J., dissenting.)

[13] —if that is what a *Bivens*-type remedy really is, rather than simply a timely evocation, in appropriate circumstances (albeit in substantial measure by grace of Congress in enacting the general federal-question statute) of interstitial doctrine that all along has lain latent, or at least mostly latent, either in the first eight amendments to the Constitution or in the antecedent common law.

[14] *Carlson* v. *Green*, 446 U.S. 14, 28 (Powell, J., concurring.)

restoration in grade and pay.[15] As of the time that the Civil Service Commission[16] directed Bush's reinstatement, with backpay, the CSC took the position that "corrective action" did not include reimbursement of legal fees and related expenses incurred by an employee in successfully seeking administrative relief. *Cf.*, albeit in the context of a discussion of review of allegedly discriminatory employment practices, Goodman, *Handbook on Public Personnel Law* 177, 212 (1978). There was judicial authority to support such position. *See, e.g., Fitzgerald* v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), construing § 14 of the Veterans' Preference Act of 1944 as amended (5 U.S.C. § 7701). Since Bush's ultimately successful appeal to the CSC's Appeals Review Board was not, and temporally could not have been, to the Merit Systems Protection Board, the attorneys' fee provisions[17] of the 1978 amendments to the Veterans' Preference Act were not, and still are not, available to Bush. *Payne* v. *Panama Canal Co.,* 607 F.2d 155, 164 (5th Cir. 1979). Nor do cognate amendments, effected at the same time, of the Back Pay Act aid Bush: while both

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[15] Since this case has not yet advanced to the proof-taking stage, the record necessarily does not reflect all of Bush's claimed economic losses. The principal categories of those losses are delineated, however, in certain *parts* of the penultimate paragraph of Bush's affidavit (J.A. 36) accompanying his interim response to Lucas' motion for summary judgment. Although the leave-time referred to in the *first two* sentences of that paragraph at J.A. 36 was time which went into the preparation of an interim response to Lucas' motion in this case, it appears that more than 100 hours of the leave-time referred to in the *third and following* sentences of that paragraph went into Bush's efforts, ultimately successful, to obtain administrative relief. That relief helped; it did not make Bush whole.

[16] As the body was then called and which former entity we call "the CSC" at various points in this brief.

[17] § 205 (g) (1), Pub. L. 95-454, 92 Stat. 1139.

grossly unfair, in the general sense of the term, and downright wrongful, the personnel action, *qua* personnel action, of which Bush complained in the CSC proceedings did not fall within the definitions of "unfair labor practices" as respectively set forth or referred to in the attorney-fee-award-triggering subsections of 5 U.S.C. §§ 7716 and 7701, as amended by the Civil Service Reform Act of 1978. *Payne* v. *Panama Canal Co., supra,* at 164.

[2] In an analogous common law action for malicious initiation of administrative proceedings (*Melvin* v. *Pence,* 130 F.2d 423, 143 A.L.R. 149 [D.C. Cir. 1942], *aff'g* 38 F. Supp. 759 [D.D.C. 1941]; Restatement of Torts, §§ 680, 681), Bush clearly would be entitled, upon proper proof, to recover not only for such economic losses as those mentioned in the immediately preceding subparagraph of this brief but also upon the dignitary elements of his claim. *Compare Bergeron* v. *Goldman,* 64 F.2d 917 (5th Cir. 1933), *with, e.g., Killebrew* v. *Carlisle,* 97 Ala. 535, 12 So. 167 (1893), *with United States Fidelity & Guaranty Co.* v. *Miller,* 218 Ala. 158, 117 So. 668 (1928), *and with* Restatement of Torts, § 681. And *see, also, Hawkins* v. *Collins,* 5 Ala. App. 522, 59 So. 694 (1912). Even in combination with restoration in grade and rank, an administrative declaration that his demotion was unconstitutional hardly compensates Bush for three years of degradation, embarrassment and anxiety.

[3] If Bush were suing a *state* official for "the deprivation of any rights, privileges, or immunities secured by the Constitution...." (42 U.S.C. § 1983), Bush could recover upon such of the dignitary elements of his claim as he proved. *Cf. Baskin* v. *Parker,* 602 F.2d 1205 (5th Cir. 1979); *and see* C. Antieau, 1 *Federal Civil Rights Acts* § 210 (2d ed. 1980) and cases there cited. There is no corresponding feature in the administrative relief provided Bush, or which he could have obtained.

(b) On his *Bivens*-type claim, Bush might recover punitive damages. *See* the Majority Opinion in *Carlson*, 446 U.S. 14, 21-22 (1980); *see, also,* the remarks of Mr. Justice Powell, as joined in by Mr. Justice Stewart, in course of explicating the concurring Justices' conclusion, in *Carlson*, that "The Federal Tort Claims Act... simply is not an adequate remedy." *Id.* at 28 and n.1; *but see, contra,* the remarks of Mr. Justice Rehnquist in dissent, *id.*, at 47. The administrative analogues to which the reaffirmed (J.A. 3) panel opinion (598 F.2d at 961) would remit Bush do not include any feature comparable to punitive damages.

(c) Although this record apparently does not disclose a jury demand on Bush's part, there is still time for him to demand a jury for the trial of his *Bivens*-type claim.[18] Lucas has yet to serve a responsive pleading in this case. Bush will have not less than ten days from and after date of service of such pleading in which to demand trial by jury. See Rule 38(b), Fed. R. Civ. P. Jury trial was not, and is not, available under the administrative remedies to which the panel opinion of 12 July 1979 (598 F.2d 958) would remit Bush. As to the significance, for present purposes, of the availability of jury trial in a *Bivens*-type suit, *see* both the Majority Opinion (446 U.S. 14, 22-23) and the observations of Mr. Justice Powell in the Concurring Opinion (*Id.*, at 28 and n.1) in *Carlson*.

(d) Bush availed himself of administrative remedies largely shaped by regulations adopted under broad and imprecise delegations. *See* §§ 1301, 1302 (b), 3302, 5596 and 7701 of Title 5 of the United States Code, as those sections stood prior to the

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[18] Assuming that such demand was not endorsed on the complaint as originally filed in state court. (The copy of the complaint in this record [R. 6—9] was an exhibit to Lucas' petition for removal of the action from state to federal court [J.A. 8-9].)

Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111—1227), together with Civil Service Rule V, as set out in Subchapter A of Chapter 1 of the Civil Service Regulations (5 C.F.R.) as the same stood prior to changes in the wake of the just-mentioned Act of 1978; and *see*, further, 5 C.F.R. §§ 550.801—550.804, 752.101—752.402 and 772.101—772.404 (1975), also as *those* regulatory sections stood prior to the just-mentioned changes. In the aggregate, the mentioned regulations and the underlying delegations did not disclose, we submit, any Congressional intent to pre-empt a judicial remedy for federal functionaries' violations of federal employees' constitutional rights albeit such violations occurred in the context of an adverse personnel action. There are too many gaps in the remedial pattern for it to be regarded as *either* sufficiently comprehensive *or* sufficiently focalized to preclude a *Bivens*-type remedy for such violations. In that respect, as well as perhaps others, the case at bar is far different from *Brown* v. *GSA*, 425 U.S. 820 (1976), where this Court admittedly did hold "that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of *discrimination* in federal employment" (*Id.* at 835; emphasis added.)

(e) In evaluating Bush's administrative remedies, one must remember that those remedies derive their very existence from waivers of sovereign immunity, in the underlying statutes. Those statutes afford remedies against the United States; they do not afford remedies against individual federal functionaries.[19] As waivers of sovereign immunity, such statutes uniformly—or, at least, regularly—receive strict construction by the courts. *See, e.g., United States* v. *Testan*, 424 U.S. 392 (1976); *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir.

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[19] Indeed, to the extent that federal functionaries are able to induce courts to hold that such remedies are exclusive, the remedies actually tend to immunize real wrongdoers and, pro tanto, to penalize taxpayers by distributing the costs of reparation over the entire community of taxpayers.

1979); *Morris* v. *United States*, 595 F.2d 591 (Ct. Cl. 1979); and *Hurley* v. *United States*, 624 F.2d 93 (10th Cir. 1980). Thus, in their presently relevant parts, the Back Pay Act and the Veterans' Preference Act, both as amended, are not to be extended beyond personnel actions, *qua* personnel actions. They do not, they can not, provide more than a *partial* remedy for the wrong done Bush. There is no evidence that, in enacting and amending those statutes, Congress meant for federal employees in Bush's position to receive half a loaf. Had Congress meant for the remedies which it made available under those statutes to be exclusive, it would have been very easy for Congress to say so. It has not said so.

(f) Finally, the postulated alternative remedy is wholly deficient as a *deterrent*. Just as the *Carlson* majority concluded that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States..." (446 U.S. at 21), so also, we submit, should this Court conclude that Bush's *Bivens*-type suit is more effective as a deterrent than the administrative remedies to which the Fifth Circuit would remit Bush.

CONCLUSION

The judgment of the court of appeals should be reversed and this case remanded to that court, with directions further to remand the case to the trial court for trial after the allowance of time for full discovery.

Respectfully submitted,

WILLIAM HARVEY ELROD, JR.,
205 Holly Street, N.E.,
Decatur, Alabama 35602
Tel. No. 205-355-2644
Attorney for Petitioner

14 September 1982.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 80-2435

September 14, 1981

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

Mary Ellen Sonntag,
Plaintiff-Appellant,

vs.

George E. Dooley; Joseph A. Genna; and Roy Carlton,
Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Illinois,
Eastern Division.

No. 79-C-2876
Judge Nicholas J. Bua

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 81-4137

Mary P. McAnaw, M.D.,
Plaintiff,

vs.

Donald L. Custis, et al.,
Defendants.

MEMORANDUM AND ORDER

Plaintiff, Dr. Mary P. McAnaw, is a physician employed by the Veterans Administration Medical Center at Leavenworth, Kansas. She is the Chief of Surgical Services at that hospital. Plaintiff has brought this action against four defendants: Donald L. Custis, Administrator of the Veterans Administration; Dr. D. Earl Brown, Jr., Deputy Assistant Chief Medical Director for Professional Services of the Veterans Administration; Dr. K. Paul Poulose, Chief of Staff of the Veterans Administration Medical Center at Leavenworth, Kansas; and Margaret C. Michelson; Director of the Veterans Administration Medical Center at Leavenworth, Kansas. Defendants Custis and Brown are sued only in their official capacities. Defendants Poulose and Michelson are sued in both their official and individual capacities.

Plaintiff charges defendants with taking various administrative actions against her in retaliation for the exercise of her First Amendment rights. Plaintiff further charges that the retaliatory measures have also impaired her right to travel, her right of association, and her due process and equal protection

rights. Certain pendent state law claims are also made. Plaintiff has requested relief in the form of monetary damages and injunctive relief. Plaintiff's request for a preliminary injunction against holding an administrative disciplinary proceeding under 38 U.S.C. § 4110 and taking other retaliatory actions has been denied previously by this court.

Defendants have filed a summary judgment motion. This motion is mainly concerned with the propriety of plaintiff's motion for a preliminary injunction. Since plaintiff was not granted the injunction, we need only concern ourselves with defendants' contention that this action lacks a proper jurisdictional basis. Defendants argue that this is an employment discrimination case which must be brought under 42 U.S.C. § 2000e-16. This section prohibits personnel actions taken by executive agencies to discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16(a).

Plaintiff argues that this is a *Bivens* action for which jurisdiction is appropriate under 28 U.S.C. § 1331. Plaintiff also claims jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1985, and certain provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

We believe the most important question raised by the summary judgment motion is whether plaintiff has stated a cause of action. If plaintiff may bring a *Bivens* action under the circumstances alleged in this case, then jurisdiction is proper under 28 U.S.C. § 1331. *Kite* v. *Kelley*, 546 F.2d 334, 337 (10th Cir. 1976). Therefore, defendant's summary judgment motion might better be construed as a motion to dismiss for failure to state a claim. For the reasons stated below, we believe that plaintiff has properly alleged a *Bivens* action which may not be dismissed at this early stage of litigation. We also believe this conclusion renders unnecessary a further decision on the validity of the other jurisdictional bases asserted by plaintiff.

Of course, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) has engendered considerable judicial and scholastic commentary. With *Davis* v. *Passman*, 442 U.S. 228 (1979) and *Carlson* v. *Green*, 446 U.S. 14 (1980), the Supreme Court has confirmed the vitality of *Bivens* for constitutional torts arising from the eighth and fifth amendments and supplied some guidance for the employment of the *Bivens* remedy. Without engaging in an extended discussion of *Bivens* and its progeny, we believe that the propriety of a *Bivens* claim may be determined by answering four questions: 1) whether a constitutional tort has been alleged; 2) whether Congress has provided an equally effective alternative remedy which it has declared to be a substitute for recovery directly under the Constitution; 3) whether "special factors counseling hesitation" exist giving the court reason to deny judicial relief; and 4) whether official immunity on the part of an official bars judicial relief.[1] See Note, *The Bivens Doctrine Ten Years Down the Road*, 47 BROOKLYN L.REV. 125 (1980).

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[1] One might argue that *Bivens'* application to first amendment violations must also be determined. This is relatively uncontroversial though. With *Davis* v. *Passman*, *supra*, and *Carlson* v. *Green*, *supra*, it is clear that *Bivens* remedies extend beyond fourth amendment violations. Moreover, several lower courts have recognized the potential for *Bivens* actions in first amendment cases. E.g., *Milhouse* v. *Carlson*, 652 F.2d 371 (3d Cir. 1981); *Yiamouyiannis* v. *Chemical Abstracts Service*, 578 F.2d 164 (6th Cir. 1978) *cert. denied*, 439 U.S. 983 (1978); *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977) *cert. denied*, 438 U.S. 916 (1978); *Paton* v. *La Prade*, 524 F.2d 862 (3d Cir. 1975); *Jihaad* v. *Carlson*, 410 F.Supp. 1132 (E.D. Mich. 1976); *Berlin Democratic Club* v. *Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976); *Butler* v. *United States*, 365 F.Supp. 1035 (E.D.N.Y. 1973); see also, *Kite* v. *Kelly*, *supra*; *Tatum* v. *Morton*, 562 F.2d 1279 (D.C. Cir. 1977); *Neely* v. *Blumenth[illegible]* 458 F.Supp. 945 (D.D.C. 1978); *Sparrow* v. *Goodman*, 361 F.Supp. 566 (W.D.N.C. 1973) *aff'd sub nom.*, *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974).

HAS A CONSTITUTIONAL TORT BEEN ALLEGED?

We are obliged at this point in the litigation to assume the truth of the allegations made in the complaint. The complaint alleges that defendants retaliated against plaintiff for her comments concerning the treatment of VA hospital patients, the testing of experimental drugs, the relationship between private drug manufacturers and V.A. physicians, and other matters of hospital operation. The alleged retaliatory action impaired plaintiff's right of association. Of course, the first amendment protects the right of free expression and association. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Public employees do not forfeit these rights by virtue of their employment. *Elrod* v. *Burns*, 427 U.S. 347 (1976). Job actions taken in relatiation for public expression or private comments on matters of public concern constitute constitutional torts when the actions taken are not necessitated by legitimate business or administrative interests. Cf., *DeLuca* v. *Sullivan*, 450 F.Supp. 736 (D. Mass. 1977) (§ 1983 action may be brought against defendants who allegedly failed to promote plaintiffs because of their criticism of union activity and political interference with the police department). After examining the complaint in this case, we believe it is clear that a constitutional tort has been alleged. Of course, defendants may assert at a later time that plaintiff's first amendment rights are circumscribed by defendants' legitimate interest in orderly administration.

HAS CONGRESS PROVIDED AN EQUALLY EFFECTIVE ALTERNATIVE REMEDY WHICH IT HAS DECLARED TO BE THE EXCLUSIVE RELIEF AVAILABLE TO THE PLAINTIFF?

It has not been demonstrated that Congress has afforded plaintiff an effective alternative remedy for plaintiff. Title 42 Section 2000e-16 controls discrimination on account of race, color, religion, sex, and national origin. It does not afford a

remedy for actions taken to penalize the exercise of free speech. Defendants contend that this is a gender discrimination action in disguise because plaintiff has filed an administrative complaint charging sex discrimination based on the same affidavit plaintiff has filed in this case. The detailed complaint and accompanying affidavit indicate that plaintiff is making a serious first amendment claim in this case. We are unwilling to require plaintiff to exhaust her administrative remedies for her sex discrimination claim before bringing her first amendment claim to court, merely because the two claims arise from related events.

Defendants also claim that plaintiff has an effective remedy through the 38 U.S.C. § 4110 disciplinary proceeding. The existence of this remedy was one factor which persuaded the court to deny injunctive relief in this case. Plaintiff's fear of a forced transfer was a chief concern in her bid for injunctive relief. But, the court felt that a transfer could be challenged, and should be challenged through the procedures of 38 U.S.C. § 4110 before court action was sought. We do not perceive § 4110, however, as an adequate mode for redressing plaintiff for actions which have already been taken against her in retaliation for the exercise of first amendment rights—particularly when these actions have not been taken by a disciplinary board and do not involve a dismissal or demotion.

The cases relied upon by defendants in oral argument, *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981) and *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980), indicate that civil service remedies foreclosed a *Bivens* action in cases where federal employees have been demoted or constructively discharged for wrongful reasons. In *Bush* v. *Lucas*, *supra*, the court did not consider the civil service remedy "an effective alternative remedy." Instead, the court considered it a "special factor counseling hesitation." The court believed that inferring a *Bivens* remedy in spite of the civil service remedy

> would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established. Ultimately it would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights.

647 F.2d at 577. In *Bishop* v. *Tice, supra,* although the court characterized a *Bivens* action as a "parallel" remedy, it also concluded that the civil service procedures

> constitute[d] a "special factor counseling hesitation" in the creation of a constitutionally based remedy for a wrongful dismissal; we are persuaded it would therefore be unwise to infer a cause of action for damages directly from the Fifth Amendment.

622 F.2d at 357. Thus, with regard to the question of whether an equally effective alternative remedy exists for plaintiff, *Bush* and *Bishop* are distinguishable on two grounds: 1) the cases concerned demotion and dismissal—actions for which civil service remedies may exist—but actions which are not alleged in this case; and 2) *Bush* and *Bishop* declared the civil service procedures to be "special factors counseling hestiation" not equally effective remedies. In sum, we conclude that an equally effective alternative remedy has not been demonstrated.

DO "SPECIAL FACTORS COUNSELING HESTITATION" EXIST?

We believe that a court should hestiate before involving itself in employer-employee relationship particularly when machinery has already been established for the resolution of problems aris-

ing from such relationships. This concern, however, shall not prevent us from sanctioning the implication of a *Bivens* action in this case for two reasons. First, we must acknowledge that courts are constantly forced to examine employer-employee relationships—sometimes under circumstances analogous to those alleged here. Indeed, by implying a *Bivens* action under these circumstances, we are merely allowing an action to be taken against federal officials for conduct which is actionable under 42 U.S.C. § 1983 against state officials. Thus, the court is not operating in uncharted waters or interfering in an area traditionally exempt from judicial supervision. The second reason why interference with the employer-employee relationship does not counsel us to deny a *Bivens* remedy in this case, is that the administrative machinery so far brought to our attention does not appear adapted or adaptable to the first amendment claims plaintiff is pursuing. Thus, we do not share the fears expressed in *Bush* v. *Lucas, supra* and *Bishop* v. *Tice, supra* that a *Bivens* remedy will promote the circumvention or subsumption of the administrative framework.

We do not know whether the implication of a *Bivens* action under these circumstances will prove to be a disincentive to Congressional action. It is easy to see, however, that if this theoried disincentive were a roadblock to asserting a *Bivens* claim, no *Bivens* action would ever be allowed. A *Bivens* remedy is a substitute for the absence of legislative relief for constitutional torts. The failure of Congress to act is a reason for implying a *Bivens* action, but not a reason against implying a *Bivens* action. Of course, the Supreme Court made it clear in *Carlson* v. *Green, supra,* that it would respect an explicit declaration by Congress that an alternative remedy has been fashioned as a substitute for recovery directly under the Constitution. 446 U.S. at 18-19. No such declaration has been shown here.

In sum, no special factor counseling hesitation has been demonstrated which convinces us that a *Bivens* action should not be inferred in this case.

DOES OFFICIAL IMMUNITY BAR JUDICIAL RELIEF?

Defendants have not alleged that they are immune from the relief prayed for by plaintiff. Quite probably at least some of the defendants in this case are entitled to a qualified immunity from liability for constitutional torts. *See Butz* v. *Economou*, 438 U.S. 478 (1978). The extent to which defendants' qualified or complete immunity protects them from liability is a matter which cannot be decided at this time.

CONCLUSION

In conclusion, after an examination of the complaint and the factors which must be considered before permitting a *Bivens* action, we find that plaintiff has successfully alleged a *Bivens* action. Therefore, jurisdiction of this case is appropriate under 28 U.S.C. § 1331. Defendants' motion for summary judgment shall be denied.

Dated this 15th day of January, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 81-4137

Mary P. McAnaw, M.D.,
Plaintiff,

vs.

Donald L. Custis, et al.,
Defendants.

ORDER

This order is to clarify and correct a mistatement made in the memorandum opinion filed January 15, 1982. Therein we stated that defendants had not pleaded immunity as a defense in this case. In fact, defendants do include a claim of immunity in their answer. This correction has no bearing upon the ruling made in the memorandum opinion. The court, however, apologizes for the inaccuracy.

Dated this 15th day of January, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge